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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. —

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

MAZINE Z. FOX, ET AL.

No. —

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

PHILIP LOUIS PARKS, ET AL.

No. —

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

CHRISTINA MARIEA EDER, EXECUTRIX OF LAST WILL AND TESTAMENT OF JACOB F. OTTMULLER, DECEASED

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Secretary of the Interior, prays that writs of certiorari

issue to review the judgments of the United States Court of Appeals for the District of Columbia entered in the above-entitled causes on June 30, 1943, reversing the judgments of the United States District Court for the District of Columbia.

OPINIONS BELOW

The opinion of the Court of Appeals (R. III, 1450) is not yet reported. The District Court filed a memorandum opinion (R. I, 271) and findings of fact and conclusions of law (R. I. 303, 324, 330, 350, 361, 383).

JURISDICTION

The judgments of the United States Court of Appeals for the District of Columbia sought to be reviewed were entered on June 30, 1943 (R. III, 1460). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Respondents are water users upon a reclamation project. Their water-right contracts call for 3 acre-feet per acre per annum, to take the simplest example, and accept a construction charge of $52 per acre. Until 1930 they were allowed the free use of additional water. Thereafter, because of recurring water shortages and the impending full development of distribution systems on the project, the Secretary of the Interior announced that the additional water must be paid for. Respondents

brought suit to enjoin him. The principal questions presented are:

1. Whether reclamation project water users because of past use are entitled to receive indefinitely and without charge amounts of water in excess of that fixed by their water-right contracts. This question, of great importance in the administration of the reclamation program, turns on the basis and the measure of the users' water rights.

2. Whether the court below, in holding that beneficial use differs essentially from an economical use, erred in dispensing with the test of reasonable economy in the use of water, and in thus requiring the Secretary to deliver water in excess of amounts found by him to be reasonably needed for beneficial use.

3. Whether the reclamation laws prevent the Secretary from (a) charging for additional water developed by additional construction, or (b) undertaking additional construction where a majority of the water users in a project involved, though not in one division thereof, agree to repay the cost.

STATUTES INVOLVED

The pertinent provisions of the federal reclamation law (43 U. S. C. c. 12) and statutes of Washington (secs. 7408–7411, Remington Revised Statutes of Washington, Sess. L. of 1905, c. 88, pp. 180–183) are set forth in the Appendix, *infra,* pp. 25–33.

STATEMENT

The salient facts found by the District Court (R. I, 303, 330, 361) are as follows: The lands of respondents are located within the Sunnyside Division, one of five main divisions of the Yakima reclamation project in Washington. The Sunnyside Division is represented by the Sunnyside Valley Irrigation District. The Yakima project was initiated in 1905, pursuant to the Reclamation Act of June 17, 1902 (32 Stat. 388, 43 U. S. C. c. 12), and in conformity with the statutes of the State of Washington (8 Remington Revised Statutes, secs. 7408–7413). In undertaking the construction and operation of the Yakima project, the United States withdrew and appropriated all of the then unappropriated waters of the Yakima River, in full compliance with the laws of Washington (R. I, 306–307, 333–334, 364–365). The United States also purchased the comparatively small canal system and related water rights of the Washington Irrigation Company (R. I, 336).

Pursuant to the provisions of section 4 of the Reclamation Act (43 U. S. C. secs. 419, 461), the Secretary of the Interior on March 2, 1909, issued a public notice announcing $52 as the construction charge per acre and 3 acre-feet per acre per annum as the amount of water to be furnished for the land described in the notice, including the lands of respondents Eder and Fox (R. I, 309, 336, 367). The water-right contracts between the United

States and the predecessors in interest of these respondents each provide, in different ways, for furnishing 3 acre-feet of water in return for a construction charge of $52 per acre.[1] Parks' predecessors made a contract with the United States which called for 3 acre-feet of water "or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States, * * *" (R. I, 339).[2]

[1] In the *Eder* case, the water right contract provides that "the quantity of water to be furnished hereunder shall be 3 acre-feet of water per annum per acre of irrigable land," and "the applicant hereby agrees * * * to pay for said water right the estimated cost of construction as fixed by the Secretary of the Interior, namely, the sum of $52.00 per acre * * *" (R. I, 368–369). In the *Fox* case, the water right contracts provide for the payment of the $52 construction charge and that "the measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share proportionate to irrigable acreage, of the water supply actually available as determined by the project manager or other proper officer of the United States * * *." The amount of irrigable land included in the Sunnyside Division and the amount of water actually available for the lands under the division is such that the share proportionate to irrigable acreage as specified in the contracts of the predecessors of Fox is equivalent to 3 acre-feet per acre per annum (R. I, 310–311).

[2] The consideration was the conveyance of the then owner's pre-existing water right from the Company, equivalent to 2.6 acre-feet, plus a construction charge of $10 per acre (R. I, 337–338), not $52 an acre as indicated in the opinion of the Court of Appeals (R. III, 1451).

Prior to 1930, water deliveries substantially in excess of 3 acre-feet had been made to respondents' lands. This was under the "holler" system, by which calls for additional water were met, when the surplus water was available, whether or not the water was actually needed for beneficial use. The "holler" system resulted in a wasteful use of the water (R. I, 311, 342, 369). Prior to 1930 there had never been a determination by an agent or official of the United States as to the amount of water "required to successfully irrigate the land," or that the amounts actually delivered were necessary to irrigate beneficially respondents' lands (R. I, 312, 342, 370).

In 1930, however, the project was facing years of water shortage by reason of severe dry cycles. At the same time the period of construction of storage in advance of the construction of distribution systems, which had made possible excess deliveries in the past, was drawing to a close. The delivery of excess water on the basis of the "holler" system could not be continued. In the interests of the project as a whole, including the Sunnyside Division, it was necessary that construction of the Cle Elum Dam and Reservoir be undertaken (R. I, 315–316, 345–346, 374–375). If the lands in the Sunnyside Division were to continue to receive water in excess of the amounts the United States had agreed to deliver, and if in dry years, for "insurance," the lands in the divi-

sion were to receive substantially their contract amounts, it would be necessary that they participate in the repayment of the cost of constructing the storage works necessary to develop and supply the additional water (R. I, 316, 375, 346–347).

The Sunnyside Valley Irrigation District was interested in purchasing an additional water supply but it did not know how much additional water would be needed, and it requested that a determination be made of the amounts of water required "to successfully irrigate" the lands, as provided in the Parks' type of contract (R. I, 317, 347, 375; Def. Ex. 71, R. III, 1320–1322). Thereafter, the notice of October 17, 1930, was issued by the Secretary (R. I, 317, 347, 376; Def. Ex. 17, R. II, 950–953). This notice provided that during 1931, and thereafter until further notice, water deliveries would be limited under the public notice contracts (Eder and Fox) to the 3 acre-feet specified in the contracts; so long, however, as there was surplus stored water available, excess water could be rented by water users for $1.50 per acre-foot, the payments to be credited toward the unsecured portion of the construction costs of the reservoir system of the Yakima project. The notice also provided, with respect to the lands such as Parks', for the determination of the amount of water required "to successfully irrigate" the lands, and announced that the delivery of water in subsequent years would be governed by such

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determination. After this determination had been made through a well-qualified expert (R. I, 340–341), the Secretary, on May 5, 1922, issued a public notice restricting the amount of water to the approved determination (3.5 acre-feet in the case of Parks) and providing that additional amounts likewise would be subject to water rental charges (R. I, 341; Pl. Ex. 13, R. II, 956–957).

When the Government during the irrigation season of 1932 attempted to deliver water in accordance with these notices, the District through representative water users, obtained a temporary injunction in the United States District Court for the Eastern District of Washington. The Circuit Court of Appeals for the Ninth Circuit dissolved this injunction and directed dismissal on the ground that the Secretary of the Interior was a necessary party. *Moore* v. *Anderson,* 68 F. (2d) 191, certiorari denied 293 U. S. 567.

Respondents' actions were then brought, as test cases, in the District of Columbia. Their amended complaints (R. I, 1, 49, 71) alleged that the successive Secretaries of the Interior had determined, by "a practical construction" of the contracts, that 4.84 acre-feet in the Fox case, 5.56 acre-feet in the Eder case, and 6 acre-feet in the Parks case were necessary to irrigate beneficially their lands; and that the right to the use of those amounts had vested in respondents and had become appurtenant to their lands. It was further alleged that 3 acre-

feet in the Fox and Eder cases and 3½ acre-feet in the Parks case is not sufficient to irrigate beneficially respondents' lands. Petitioner's motions to dismiss the amended complaints were denied. On special appeals, the Court of Appeals (66 App. D. C. 128, 85 F. (2d) 294) affirmed, as did this Court on certiorari (300 U. S. 82).

After an extended trial on the merits, the District Court found the facts in every material respect to be contrary to those alleged in the amended complaints (R. I, 303, 330, 361). It held, in summary, that the action of petitioner in issuing the notices was within the scope of his authority and was not in violation of any rights of respondents, which were based upon their contracts with the United States. The court further held that respondents did not make beneficial use of the water in excess of 3 acre-feet in the Fox and Eder cases or 3.5 acre-feet in the Parks case (R. I, 324, 355, 383). It accordingly entered judgments dismissing respondents' complaints (R. I, 329, 360, 388).

The Court of Appeals reversed the District Court on the grounds that the District Court failed to follow the earlier decision of this Court, and that the District Court's findings on beneficial use were based upon an erroneous theory. It directed that the Secretary be enjoined from imposing a charge for such additional water as he should determine "may be used" on the respondents'

lands, and that in making that determination he be enjoined from "construing their applications as contracts."

REASONS FOR GRANTING THE WRIT

The decision of the District Court was not, as the Court of Appeals thought, inconsistent with the decision of this Court in *Ickes* v. *Fox,* 300 U. S. 82, at an interlocutory stage of the proceedings. In that case this Court held that the United States was not an indispensable party, reasoning that the water users had a property right in their water and not, as the Government urged, merely a contract right to use water which was the property of the Government. Statements and phrases can be extracted from the opinion to show that the Court by way of dictum intimated that this water right was based either upon appropriation by the water users (300 U. S. at 94, 95), or was based upon and limited by their contracts with the Government as they were construed in practice (300 U. S. at 91, 94, 97). But in 300 U. S. 82 it was assumed, on the basis of the unchallenged allegations of the complaints, that the past use was beneficial, was confirmed by the successive Secretaries, and amounted to a practical construction of the water-right contracts. The Court therefore assumed that past use was the measure of the water right (300 U. S. at 91–92). The District Court, after an extended trial on the merits, which showed the allegations of the complaints in every

material respect to be untrue, found that the contracts were in fact the measure of the water rights, as shown by their terms and by the nature of the respondents' water use, and that there was no contrary construction of the parties (R. I, 303, 313, 325, 330, 342, 355, 361, 370, 383).

The court below reversed without in any respect questioning the sufficiency of the evidence to support the findings. Its decision seems to have been based upon a proposition of law, either (a) that respondents' water rights were based upon prior appropriation, or (b) that respondents had rights to the water at least analogous to prescriptive rights (R. III, 1454).[3] Whatever the basic theory of the court below, and whether it be sup-

[3] Another passage (R. III, 1454) suggests that, irrespective of contract and use alike, respondents are entitled to the amount of water needed for beneficial use. But neither this Court nor the court below could have intended to rule that the Bureau must deliver to each user the full amount needed for beneficial use without regard to the contracts or indeed to the water available, or to deliver free of charge extra amounts of water needed for beneficial use. If more water were needed for beneficial use than the amounts stated in respondents' contracts (which assumption was proved to be without basis), there is no state or federal law, or decision of any court, requiring the Secretary to deliver free of charge the extra amounts needed. Respondents cannot insist that the extent of their contract obligation to the United States is the amount provided in their water-right contract, and thus standing on their contracts so far as their obligation is concerned, ask that amounts of water in excess of the amounts provided in their contracts be delivered free of charge, and no such question was decided by this Court in its former opinion.

ported or contradicted by the intimations in the earlier decision of this Court, the result is, we submit, untenable as a matter of law and of the gravest consequence to the Reclamation Fund in practical effect.

1. (a) The water users cannot have rights based upon prior appropriation. The water right, as the court below expressly recognizes, was acquired by the United States. Whatever the rights of the United States,[4] certainly the respondents can have no right of appropriation save one acquired in conformity with state law. Section 7410 of Remington's Revised Statutes, *infra,* pp. 30–32, provides in terms that there shall be no subsequent appropriation other than of the water released by the United States unless the project be abandoned. (See also R. I, 306, 364, and R. III, 1275, 1282.)

(b) It is equally clear that respondents' claims cannot be based upon prescription. The court below gives at least oblique approval to the theory of prescriptive rights by interpreting the decision

[4] In *Nebraska* v. *Wyoming*, No. 7, Orig., October Term, 1943, the United States, having intervened (305 U. S. 561), urges that the United States is the owner of the unappropriated water of nonnavigable streams in the western states and acquires project water rights by reservation rather than by appropriation. This issue is not, under the pleadings and evidence, present in these cases. If it were, the Government would urge on similar grounds that respondents in no view could have rights to water other than those flowing from their contracts with the United States.

of this Court in the light of the Government's petition for rehearing (R. III, 1454). But, if such was its ruling, it is directly contrary to the decisions of the Washington courts (*Weidensteiner* v. *Mally*, 55 Wash. 79 (1909); *Rhoades* v. *Barnes*, 54 Wash. 145 (1909)), and to the laws of the State of Washington. Section 7410 of Remington's Statutes, *infra*, pp. 30–32. Whatever the rights of the United States, certainly respondents cannot acquire property rights in contravention of state law.

(c) Whatever the theory which underlies the decision of the court below, it is clear that it reversed because the trial court held that the respondents' rights are based upon and measured by their water-right applications (R. III, 1453). Indeed, the court below enjoined the Secretary, in determining their water rights, from construing these instruments as contracts (R. III, 1458).[5] But it seems entirely plain that this is just what the

[5] The decision of the court below that the water right contracts or applications are *not* contracts seems to be based upon the fact that this Court held that the plaintiffs were entitled to bring a suit against the Secretary for the protection of property rights. But such rights, protected by statute or common law against impairment by public officers, may grow out of or be limited by contract; and the validity and construction of the contract may be determinative on the merits. The court below did not question that the $52-per-acre construction charge is a fixed obligation which must be contractual in nature. In result it has created an instrument which is half contract and half something else, of undetermined effect.

water-right applications are, and that respondents' rights can be measured in no other way.

The water-right application of Parks is called a contract, those of the others simply an application, but each is obviously a contract both in form and in effect (R. II, 700, 707, 715, 723, 730). They were alleged by respondents in their complaints to be contracts (R. I, 5, 52, 74). This Court recognized (300 U. S. at 95, 96, 97) that the applications were contracts. Indeed, Congress itself has so defined the application.[6] The settled rule of irrigation law, recognized by the state and federal decisions in every western state, is that where a water user enters into a contract with an irrigation company, or with the United States, for a water supply for irrigation purposes, the water user's rights to a supply

[6] Section 45 of the Act of May 25, 1926 (44 Stat. 648), in terms defines water-right applications, such as are involved here, as contracts. The various reclamation laws direct the Secretary to furnish water by contract: see section 5 of the Reclamation Act of June 17, 1902 (32 Stat. 389, 43 U. S. C. sec. 431); section 4 of the Act of April 16, 1906 (34 Stat. 116, 43 U. S. C. sec. 567); Act of April 30, 1908 (35 Stat. 85); Act of February 21, 1911 (36 Stat. 925, 43 U. S. C. secs. 523, 524, 525); sections 1 and 2 of the Reclamation Extension Act of August 13, 1914 (38 Stat. 686, 687, 43 U. S. C. secs. 471, 472, 475); Act of January 25, 1917 (39 Stat. 868); Act of February 25, 1920 (41 Stat. 451, 43 U. S. C. sec. 521); section 5 of the Act of December 21, 1928 (45 Stat. 1060, 43 U. S. C. sec. 617d); sections 9 (c) and 9 (e) of the Reclamation Project Act of August 4, 1939 (53 Stat. 1187); section 9 of the Act of October 14, 1940 (54 Stat. 1119).

of water are based upon and are limited by the terms of the contract. Kinney on *Irrigation and Water Rights* (2d ed.) secs. 1513, 1514, pp. 2723, 2727.[7] The Supreme Court of Washington and the Circuit Court of Appeals for the Ninth Circuit fully recognize this rule. *Wenatchee Reclamation District* v. *Titchenal,* 175 Wash. 398, 404 (1933); *Twin Falls Salmon River Land & W. Co.* v. *Caldwell,* 242 Fed. 177, 193–194, affirming 225 Fed. 584, 591, 599. The decision below is, therefore, in direct conflict with this large body of settled law.

2. Whatever the terminological or legal uncertainties of the decision below, or of the underlying decision in 300 U. S. 82, the result is entirely clear. In holding that because the respondents have in the past received water deliveries in excess of the amounts called for in their water-right contracts, they have a right to receive without payment corresponding amounts for the indefinite future, the decision will have a serious and possibly a catastrophic effect upon the administration of the reclamation program and upon the integrity of the Reclamation Fund.

It will be remembered that the Fund is a revolving fund made up from the returns from sales of public lands and the payments of construction charges by water users on the irrigation projects

[7] We do not burden this petition with the 47 cases, from every western state, cited in petitioner's brief below (Br. 45–48) which support and apply this rule.

(32 Stat. 388, 43 U. S. C., sec. 391). The Secretary under the Reclamation Act is required by law to prevent the impairment or depletion of the Reclamation Fund and must make charges to the water users with a view of returning to the Reclamation Fund the estimated cost of construction of the projects (32 Stat. 388, 389; 43 U. S. C., secs. 419, 461). See *Swigart* v. *Baker,* 229 U. S. 187, 197; *Yuma County Water Users' Association* v. *Schlecht,* 262 U. S. 138, 143. On this theory, 45 projects have been put into operation since 1902, irrigating more than 3,500,000 acres of land at a total investment for power, irrigation, and other purposes, of over $800,000,000,[8] of which $362,000,000 represents an investment which is now under contract for repayment by water users.

The consequences of the decision below go far beyond the Yakima project.[9] There are, in addition, 20 projects on which about 32,000 individual water-right contracts, affecting 1,350,000 acres, have been made and which would seem similarly covered by the decision below.[10] In the construction of reclamation projects, the storage is ordi-

[8] Annual Report of Secretary of the Interior, 1942, pp. 5, 14, 24.

[9] The three cases are test cases involving the rights of 3,000 water users with similar contracts in the Sunnyside Division of the Yakima project.

[10] On 30 projects since 1926, the initial contracts have been made directly with the irrigation districts instead of the individual water users, but the decision below would seem to give the individual users the same rights to the water as though they contracted directly with the United States.

narily completed in advance of the irrigation canals and distribution facilities. On these projects, accordingly, the early water users have received for a long or a short period amounts of water in excess of that called for by the water-right contracts. Under the decision below this temporary excess of water would seem in every case to have ripened into a donated property right. The cost to the Reclamation Fund of such a result cannot be estimated but would certainly be many millions of dollars, and would often require the construction of additional works in order to give subsequent users the amounts called for by their contracts. The decision, in many projects, would also place the Bureau under the impossible task of supplying water equal to the maximum past use of all water users, those who used a temporary surplus and those who obtained and paid for their water later, thus eliminating the temporary surplus. The result would inevitably be to impair the Reclamation Fund, possibly to an extent that would force Congress to revise the entire theory of the reclamation program.

It is of equal importance that the decision below gives a premium to the water user who wastes water, and thus builds up a greater past use, and penalizes the user who conserves water and thus uses less per acre. It promotes and even requires grievous inequities and discriminations between the users, for they each will pay, for example, $52 for 3 acre-feet and Fox, for example, will get 6

acre-feet and his neighbor, who practices economy in the use of water, 3 acre-feet or less.

The decision below not only undoes the intended effect of 32,000 contracts and 40 years' practice, but makes future administration difficult. Under section 4B of the Act of December 5, 1924 (43 Stat. 702, 43 U. S. C., sec. 412), and Section 9 of the Reclamation Project Act of 1939 (53 Stat. 1187) no project or division can be commenced unless the Secretary makes a finding of feasibility and that the costs will be returned to the United States. If the water right contracts yield to actual use by water users, it will be impossible to make reliable predictions of repayment unless the Secretary is resolute enough, and has a staff large enough, to insure that the early surplus water is turned down the river rather than being put even to temporary use by the early farmers.[11]

In truth, the reclamation projects can be operated only on the basis which has prevailed for the entire 40 years of their history, and on which the Government's immense investment has been made. The amount of water to be made available is allocated to the irrigable acreage, the construction costs are placed against each irrigable acre,

[11] No language or agreement in the water-right contract would seem competent under the decision below to preserve the intention of the parties; if the present contracts had stipulated for "3 acre-feet and no more, even though excess water be delivered free of charge while it be available," this explicit and unnecessary language would apparently yield to the rights based upon past use.

and contracts are made (with the water users or their organization) for repayment of the specified costs for the specified amount of water. To allow past and temporary use to vary the amount of water required to be furnished under the contracts, while leaving the construction charges unchanged, is to invite bankruptcy of the Reclamation Fund and a disastrous uncertainty for the water user.

3. It is our position, here as in the courts below, that even if the water-right contracts are to be disregarded so far as they specify the amount of water to be delivered, the respondents are not in any event entitled to enjoin the Secretary, because 3 acre-feet (for Fox and Eder) and 3.5 acre-feet (for Parks) are all that are needed for beneficial use upon their lands. This question of fact was found against respondents (R. I, 313, 341, 371–372). The court below did not question the sufficiency of the evidence to support this finding but brushed it aside because, according to the court below, the district court "confused beneficial use with economical use" (R. III, 1456). This decision represents a dangerous innovation in the water law of the arid states.

We do not urge that a beneficial use requires the utmost possible economy in the use of water, regardless of expense. We do urge that it requires a reasonable economy in the use of water, and that a wasteful use cannot be beneficial. The rule was well stated in *Burley Irrigation District* v. *Ickes,*

116 F. (2d) 529, 535 (App. D. C.), that the right of the prior appropriator—

> is qualified by the limitation, made in favor of subsequent appropriators and the widest possible use of water on arid lands, that all of the water he uses must be beneficially applied and with reasonable economy in view of the conditions under which the application must be made. Hence a use which is wasteful may be restricted in the interest of subsequent appropriators and thus of the conservation of water. Shortage makes the elimination of waste imperative.

The contrary decision of the court below in the present case, that beneficial use is something "far different" from an economical use, is in conflict with the general doctrine,[12] with the law established by the courts of the arid states,[13] and with the rule followed by the Circuit Court of Appeals for the Ninth Circuit. *Vineyard Land and Stock*

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[12] Kinney on *Irrigation and Water Rights* (2d Ed.), sec. 877, p. 1547, sec. 916, p. 1622.

[13] *Shafford* v. *White Bluffs Land & Irr. Co.*, 63 Wash. 10, 14 (1911); *Hough* v. *Porter*, 51 Oreg. 318, 420 (1909); *Farmers' Cooperative Ditch Co.* v. *Riverside Irr. Dist.*, 16 Idaho 525, 535 (1909); *State* v. *Twin Falls Canal Co.*, 21 Idaho 410 (1911); *Combs* v. *Agricultural Ditch Co.*, 17 Colo. 146, 153 (1892); *California Pastoral & Agricultural Co.* v. *Madera Canal & Irr. Co.*, 167 Cal. 78, 81 (1914); *Hufford* v. *Dye*, 162 Cal. 147, 159 (1912); *Nichols* v. *Hufford*, 21 Wyo. 477, 492 (1913); *Hardy* v. *Beaver County Irr. Co.*, 65 Utah 28, 41 (1924).

Co. v. *Twin Falls Oakley Land and Water Co.*, 245 Fed. 30, 33.[14]

The trial court found that the water was wastefully applied to respondents' lands: an unnecessary amount of water ran off the surface as waste; there was excessive deep percolation; the use of open ditches instead of flumes caused heavy percolation losses; and 24-hour runs in a single set of furrows, instead of the customary 8 to 12 hours, wasted a large part of the water and even produced some injury to the lands. The respondents' practice was wasteful in the last respect when measured by the common and general practice in the division, and the failure to use flumes was not up to the reasonable standards of economy as practiced on "many other lands" in the division (R. I, 312, 342–343, 370–371). The court below, in ruling that on facts such as these respondents' use of water was beneficial, although uneconomical, has offered encouragement to the waste of water in the arid states. And, it may be noted, even on its own

[14] The only case which the court below cites in this connection affords it no support. *Tulare Irrigation District* v. *Lindsey-Strathmore Irrigation District*, 3 Cal. (2d) 489, makes no distinction between beneficial use and economical use. The trial court's findings clearly come within the rule stated in that case, that the amount of water required to irrigate a water user's land should be determined by reference to the system used in the locality and that the water user should not be compelled to adopt a more expensive system not in common use in the same locality.

standards (R. III, 1456–1457), the facts found by the district court and not challenged by the court below show the respondents not to have followed the practices "currently considered reasonably efficient in the locality."

The decision below seems on this point to have been largely influenced by a superficial paradox. The court was of the view that the Secretary could not offer to sell additional water and at the same time assert that 3, or 3.5 acre-feet was the measure of beneficial use (R. III, 1456–1457). The court below, however, ignores the rule announced by Justice Rutledge in *Burley Irrigation District* v. *Ickes* that "shortage makes the elimination of waste imperative." In other words, under conditions of shortage rigid economy must and will be enforced but conditions of abundance of water permit a more liberal delivery as reasonably economical, and at such times practices may be tolerated which would not and could not be tolerated under conditions of shortage. Thus, the rule that "shortage makes the elimination of waste imperative" is a necessary corollary to the general rule stated in that case, and in *Vineyard Land & Stock Co.* v. *Twin Falls,* supra, that "no person is entitled to more water than he is able to apply to a reasonable and economical use." If there were no additional water available except that originally provided in the Yakima project, any allowance to the respondents in excess of the 3 or 3.5 acre-feet

would be wasteful and unwarranted as the original project approached its full development. But the construction of the Cle Elum Reservoir was intended considerably to increase the available water supply, and the amounts of available water could be increased, within reasonable limits, to the extent that the water users bore their share of the cost.[15] Finally, even if this view of the court below were right, unless it reversed the findings of fact of the District Court it would be forced to find, not that respondents' use was beneficial, but that the Secretary's offer to sell more water was mistaken.

4. The court below, we believe, has misconstrued the reclamation laws in two other respects. (a) The opinion states (R. ~~III~~, 1454) that the Secretary cannot charge for the additional water, because section 4 of the Extension Act of August 13, 1914, *infra*, p. 28, provides that no increase in construction

[15] Moreover, the offer of temporary rental of surplus water was not made with reference to the particular requirements of the three tracts of land before the court in the pending cases. It was general with the view that among the 3,000 farms of the Sunnyside Division there might be some who could use more water than their contract amounts without exceeding the amounts reasonably permissible under conditions of abundant water supply. If Secretary Wilbur in 1930 thought there might be some among the 3,000 water users of the Sunnyside Division who, under conditions of abundant supply, could make beneficial use of more water than 3 or 3.5 acre-feet, that view is in no way in conflict with the fact now definitely established that the three tracts of land involved here do not require for beneficial use more water than the amounts specified in their respective contracts.

charge shall be made without the consent of a majority of the water users. But this refers to an increase in charges for the water promised in the water-supply contracts, not for additional water developed by additional construction. (b) The opinion states (R. III, 1455) that the Cle Elum Reservoir was constructed in violation of the Act of March 3, 1915, *infra*, p. 29, apparently because the required agreement was not made with a majority of the Sunnyside water users. But the reservoir, to serve all five divisions of the project, was constructed only after an agreement to repay the costs had been obtained from the great majority of the Yakima project water users. (R. II, 954, 945.) If these rulings were to be followed elsewhere, they would constitute a most serious limitation upon the power to develop additional water supply.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for writs of certiorari should be granted.

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